4/3/01

**SUPREME COURT OF LOUISIANA**

**No. 2000-KK-1554**

**STATE OF LOUISIANA**

**VERSUS**

**PATRICK KENNEDY**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIFTH CIRCUIT, PARISH OF JEFFERSON**

**CALOGERO, Chief Justice**[*]

This difficult case involving the capital crime of the rape of a child tests this court's resolve in upholding the law as written and as consistently followed by this court for nearly thirty years. The law governing the admission of other crimes evidence has not been changed, and however repugnant the alleged criminal conduct may be, we must apply to this case, just as we do any other, well-settled evidentiary rules that promise a process for determining guilt or innocence fairly.

We granted a writ of certiorari in this case to determine whether evidence of the defendant's alleged sexual misconduct involving the rape of a minor child in 1984 is admissible under La. Code Evid. art. 404(B) at his trial for capital aggravated rape of a different minor victim allegedly committed in 1998. The State asserts such other crimes evidence is admissible in this child sexual abuse case under a so-called "lustful disposition exception" to Article 404(B), which prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the criminal character of the accused in order to show that he acted in conformity therewith. We find, however, no such exception applicable to the instant case. Furthermore, we decline to rewrite the

[*]Melvin A. Shortess, Associate Justice ad hoc, sitting for Associate Justice Jeannette T. Knoll, recused.

evidentiary rules to allow the introduction in child sexual abuse cases of evidence of other crimes, wrongs, or acts tending to show the defendant's "lustful disposition" toward children in the absence of one of the otherwise permissible purposes enumerated in Article 404(B). Because the evidence sought to be introduced here is not independently relevant under any of the permitted purposes recited in Article 404(B), such as proof of motive, intent, or identity, we find that the court of appeal was correct in applying Article 404(B) of the Louisiana Code of Evidence and our decision in State v. Miller, 98-0301 (La. 9/9/98), 718 So. 2d 960. We therefore affirm the court of appeal's decision reversing the ruling of the district court and remand to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Defendant has been indicted by a grand jury on one count of capital aggravated rape involving his eight-year-old step-daughter on March 2, 1998, a violation of La. Rev. Stat. 14:42. The State is seeking the death penalty.[1]

In a pre-trial motion pursuant to State v. Prieur, 277 So. 2d 126 (La. 1973), the State sought to introduce evidence of the defendant's unadjudicated rape of another eight or nine-year-old girl allegedly committed sixteen years earlier in 1984.[2] At the Prieur hearing in April of 2000, this witness, now an adult, testified that sixteen years earlier the defendant, who had had temporary custody of her by permission of her mother, had inserted his penis into her vagina on three occasions. The witness did not

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[1] By Acts 1997, No. 898 and 757, the legislature made capital the crime of aggravated rape of a child under the age of twelve years, providing for a punishment of "death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury." La. Rev. Stat. 14:42(D)(2)(a).

[2] The State also moved to introduce evidence of the defendant's alleged sexual assaults on the instant victim prior to the March 2, 1998 charged conduct. The district court ruled that evidence of the first incident described by the victim could be introduced at the defendant's trial for aggravated rape, but that evidence of the two other incidents was insubstantial and, thus, could not be admitted at trial. The court of appeal affirmed these rulings, and neither party has sought writs thereon.

tell anyone other than her younger sister until some four years later, at which time a police investigation was commenced. No charges were made against the defendant after the witness withdrew her claims of sexual abuse. At the time of the Prieur hearing in the instant case, the witness was twenty-four years old.

The district court found this evidence to be admissible, noting this court's holding in Miller that "lustful disposition" evidence may be relevant to the element of specific intent. The court reasoned as follows:

> To the extent that we have heard testimony today regarding the relationship of the Defendant, that is alleged to be superior to possibly even custodial in the broadest sense over these children; the fact that these children have testified were in his home and that he had access to them; that the opportunity for predation, albeit alleged, was there; certainly is consistent with what this Court considers to be the guidelines and guidepoints; a[s] enunciated by the Louisiana Supreme Court.

The district court went on to find that the State had proved the other crimes against the witness by a preponderance of the evidence and that the probative value of the evidence exceeded its prejudicial effect.

The defendant successfully sought writs in the Court of Appeal, Fifth Circuit, which reversed the ruling of the district court admitting the other crimes evidence. The court of appeal reasoned:

> As to [the witness's] testimony, regarding other sexual acts committed by the Defendant upon her, we find the trial court erred in ruling that it was admissible. Even evidence of "lustful disposition" is not admissible unless it is to prove some element of the charged offense, like specific intent. State v. Miller, 98-0301 (La. 9/9/98), 718 So. 2d 960. Since specific intent is not at issue in the case, the evidence is not admissible to prove the Defendant's bad character, which is prohibited. La. C.E. art. 404(B); State v. Maise, 99-0734 (La. App. 5 Cir. 3/22/00), [759 So. 2d 884, writs applied for, 00-1158].

We granted the State's writ application to review the correctness of that ruling, 00-1554 (La. 6/14/00), 763 So. 2d 608, and now affirm the court of appeal.

DISCUSSION

The fundamental rule in Louisiana governing the use of evidence of other crimes, wrongs, or acts is, and has been, that such evidence is not admissible to prove that the accused committed the charged crime because he has committed other such crimes in the past. See State v. Hatcher, 372 So. 2d 1024, 1036 (La. 1979) (Tate, J., concurring on rehearing). Enacted in 1928, La. Rev. Stat. 15:446 authorized the introduction of other crimes evidence to prove guilty knowledge and intent, but it expressly prohibited the admission of such evidence "to prove the offense charged."[3] Although La. Rev. Stat. 15:446 was repealed in 1988 when the legislature adopted a formal code of evidence,[4] the principle embodied in La. Rev. Stat. 15:446 was retained and made more explicit in our Code of Evidence at Article 404(B)(1). That article now provides:

> Except as provided in Article 412 [regarding a victim's past sexual behavior in sexual assault cases], *evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.* It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

La. Code Evid. art. 404(B)(1) (emphasis supplied).

Simply put, the rule articulated in Article 404(B)(1) prohibits the State from

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[3] Former La. Rev. Stat. 15:446, entitled "Evidence where knowledge or intent is material and where offense is one of system," provided:.

> When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged.

[4] La. Acts 1988, No. 515, § 1, effective January 1, 1989, enacted the Louisiana Code of Evidence. Section 8 of that Act, repealed La. Rev. Stat. 15:446.

introducing evidence of other crimes, wrongs, or acts to show a probability that the accused committed the charged crime because he is a "bad" person who has a propensity for this type of offense. This court has long recognized that evidence of previous criminal activity does affect, reasonably or not, the opinions of the jurors sitting in judgment. See State v. Moore, 278 So. 2d 781, 787 (La. 1973) (on rehearing). Therefore, the admissibility of other unrelated misconduct "involves substantial risk of grave prejudice to a defendant." State v. Prieur, 277 So. 2d 126, 128 (La. 1973) (citing 1 Wigmore, Evidence, § 194 (3rd ed.)). As we explained in Moore:

> If the identity of the accused rapist is in doubt, it is too easy to believe that if he had committed such an offense before he would do so again. Rape is a horrible crime, committed by bad men. If the defendant committed such an offense before, it is too easy to believe that he is a bad man, and capable of the act with which he stands accused.

Moore, 278 So. 2d at 787.

Although evidence of other crimes, wrongs, or acts may not be admitted to prove that the accused is a person of criminal character, such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." La. Code Evid. art. 404(B)(1). Still, as we explained in State v. Miller, 98-0301, pp. 3-4, 718 So. 2d at 962, several statutory and jurisprudential rules govern the admissibility of other crimes evidence even when one or more of these permitted purposes is asserted.[5] Foremost, at least one of the enumerated purposes in Article 404(B) "must be at issue,

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[5] As to the requisite burden of proof, we noted in State v. McArthur, 97-2918 (La. 10/20/98), 719 So. 2d 1037, and more recently in State v. Cotton, 00-0850 (La. 1/29/01), ___ So. 2d ___, 2001 La. LEXIS 238, that Article 1104 of the Louisiana Code of Evidence was added in 1994 to provide that "the burden of proof in a pretrial hearing held in accordance with State v. Prieur, 277 So. 2d 126 (La. 1973), shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." We need not reach the burden of proof issue today, because we find that the other crimes evidence is not admissible under any of the permitted purposes enumerated in Article 404(B).

have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible."[6] State v. Jackson, 625 So. 2d 146, 149 (La. 1993); see also State v. Ledet, 345 So. 2d 474 (La. 1977). Additionally, the evidence, even if independently relevant, must be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay or waste of time. La. Code Evid. art. 403; see also State v. Moore, 278 So. 2d at 786. Finally, the requirements set forth in State v. Prieur, 277 So. 2d at 130, must be met. As we succinctly explained in Miller:

> [T]he state must, within a reasonable time before trial, provide written notice of its intent to use other acts or crimes evidence and describe these acts in sufficient detail. The state must show the evidence is neither repetitive nor cumulative, and it is not being introduced to show the defendant is of bad character. Further, the court must, at the request of the defendant, offer a limiting instruction to the jury at the time the evidence is introduced. The court must also charge the jury at the close of the trial that the other crimes evidence serves a limited purpose and that the defendant cannot be convicted for any crime other than the one charged or any offense responsive to it.

Miller, 98-0301, pp. 3-4, 718 So. 2d at 962.

A so-called "lustful disposition exception" to the evidentiary prohibition of Article 404(B) was recognized in our decision in State v. Acliese, 403 So. 2d 665 (La. 1981), in which we relied on our jurisprudence dating back to 1903 for the proposition that evidence of prior sex crimes against the prosecuting victim is admissible under an exception to the general rule excluding evidence of other crimes similar to the charged offense. 403 So. 2d at 667. In Acliese, the defendant was charged with the

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[6] This rule has its source in La. Rev. Stat. 15:435, which provided that "[t]he evidence must be relevant to the material issue." State v. Moore, 278 So. 2d at 785. As the court explained in Moore, La. Rev. Stat. 15:435 was based on the English common law provision that "'*nothing* may be given in evidence which does not directly tend to the proof or disproof of the matter in issue.'" 278 So. 2d at 785 (quoting Archbold, Pleading, Evidence & Practice in Criminal Cases, §§ 1015, 1016 (34th ed.)) (emphasis in original).

aggravated rape of a juvenile, but was found guilty of the lesser included offense of forcible rape. The State had introduced at trial evidence of prior sexual assaults by the defendant on the victim to show his lustful disposition toward her. In affirming the conviction, we acknowledged a rule of nearly universal application permitting the introduction of evidence of other acts of sexual abuse involving the same victim premised upon "the theory . . . that the evidence shows the defendant's lustful attitude *toward that person*." Id. at 668 (quoting 1 Underhill's Criminal Evidence, § 212, p. 647 (6th ed.)) (emphasis added).

Nonetheless, we have consistently restricted this judicially-recognized "lustful disposition" exception to Article 404(B) to evidence of other sexual crimes committed by the defendant against the same prosecuting victim, whether child or adult.[7] E.g., State v. Bailey, 588 So. 2d 90 (La. 1991). Otherwise, the State, in seeking to introduce evidence of other crimes, wrongs, or acts of an improper sexual nature must still satisfy the requirements of the Code of Evidence and our jurisprudence. See State v. Jackson, 625 So. 2d at 149. Thus, the use of the term "lustful disposition exception" in other contexts is misleading if considered as a general exception to Article 404(B).

In State v. Jackson, supra, and State v. Miller, supra, we sanctioned on a limited basis the introduction of evidence of improper prior sexual conduct in cases of child sexual abuse, but we did so clearly within the constraints of Article 404(B) and the balancing test of Article 403. In Jackson, the defendant was charged with molesting his juvenile granddaughters by kissing them and fondling their breasts. The State sought to introduce the testimony of the defendant's adult daughters that the defendant

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[7] Even then, there may be independent Article 404(B) or other purposes justifying the introduction of evidence of prior sexual assaults against the same victim. For example, in State v. Talbert, 416 So. 2d 97 (La. 1982), we reasoned that the defendant's prior rape of the same victim was admissible to prove the "defendant's intent to have sexual intercourse without the victim's consent." Id. at 100.

had also sexually molested them. After finding that molestation of a juvenile is a specific intent crime, in that the state must prove the defendant had the intention of arousing or gratifying the sexual desires of either himself or the victims, see La. Rev. Stat. 14:81.2, we noted that "where the element of intent is regarded as an essential ingredient of the crime charged, it is proper to admit proof of similar but disconnected crimes to show the intent with which the act charged was committed." 625 So. 2d at 150 (quoting State v. Cupit, 189 La. 509, 179 So. 837, 839 (1938)). We stated that the other crimes evidence was relevant to "proving that the defendant did not act innocently, and will negate any defense that he acted without intent or that the acts were accidental." 625 So. 2d at 150.

Like Jackson, Miller also involved the crime of molestation of a juvenile, an offense that requires the State to prove that the defendant acted with the specific intent to arouse his or the victim's sexual desires. See La. Rev. Stat. 14:81.2. Instead of prior crimes, however, Miller involved merely a lascivious statement. The defendant's specific intent being an element of the offense and a contested issue at trial, this court found that the defendant's highly inappropriate and prurient statement made to a neighbor's child regarding a sexual fantasy involving that child was admissible to reveal the defendant's specific intent to arouse or gratify either his own sexual desire or that of the victims, and was additionally admissible to discount the theory that the charged conduct, which involved the sexual touching of the victims, was an accident. Miller, 98-0301, p. 12, 718 So. 2d at 966. The defendant's statement was not a "crime" under our penal code, but we implicitly found that his statement could constitute a "wrong or act" within the meaning of Article 404(B) under the facts of the particular case. We reasoned that the statement was admissible for one of the permitted purposes set forth in Article 404(B), because, under the facts of this case

in which specific intent was materially at issue, the statement was relevant to show the defendant's "lustful disposition" towards his young granddaughters and, thus, his specific intent to molest them sexually. Id., 98-0301, p. 13, 718 So. 2d at 967. Miller, therefore, permitted the admission of "lustful disposition" evidence involving different victims, i.e., evidence of other crimes, wrongs, or acts, in the context of a specific intent crime in which the critical sexual component may be established by any act of touching, the lasciviousness of which may otherwise be ambiguous and subject to more than one innocent explanation.

Nevertheless, the admission of the other wrongs or acts evidence in both Jackson and Miller complied fully with the requirements of Article 404(B), as well as the aforementioned statutory and jurisprudential rules governing the admission of other crimes evidence. In Miller, for example, the other wrongs or acts evidence was relevant to the issue of specific intent, a key ingredient of the charged offense of molestation in that case; the State proved by clear and convincing evidence that the defendant had made the statement; the State established that it was not introducing the evidence simply to prove the defendant's bad character; and the probative value of the evidence on the issue of intent outweighed the danger of unfair prejudice to the defendant's case. Because we simply applied Article 404(B) to the other crimes evidence sought to be introduced, we did not create in Miller a "lustful disposition exception" in child sexual abuse cases. The law governing the introduction of other crimes evidence in child sexual assault cases thus remains unchanged from that set forth in La. Code Evid. art. 404(B), in which our "legislature prohibits the use of other crimes evidence 'to prove the character of a person in order to show that he acted in conformity therewith' unless it meets one of the exceptions stated in Article 404(B) or is otherwise recognized by law." State v. McArthur, 97-2918, p. 10, 719 So. 2d at

1043.

With these principles in mind, we turn to the instant case, in which the State argues in brief that the evidence of previous sexual assaults against a different child, allegedly committed some sixteen years earlier, is admissible as proof of the defendant's motive and intent to pursue his "unnatural carnal interest in sexual relations with prepubescent girls." We find that the State's other crimes evidence fits none of the permitted purposes enumerated in Article 404(B). This court has not retreated from its observation in Moore that "the matter in issue must be real and genuine, and not one which the prosecution conceives to be at issue merely because of the plea of not guilty." State v. Moore, 278 So. 2d at 785 (citing Archbold, Pleading, Evidence & Practice in Criminal Cases, §1016 (34th ed.)).[8]

Unlike Jackson and Miller, intent is not an issue in this aggravated rape case. Specific intent is simply not an element of aggravated rape. See La. Rev. Stat. 14:42; State v. McArthur, 97-2918, p. 2, 719 So. 2d at 1040; State v. Ledet, 345 So. 2d at 478. In general intent crimes, like aggravated rape, the criminal intent necessary to sustain a conviction is established by the very doing of the proscribed acts. State v. Holmes, 388 So. 2d 722, 727 (La. 1980). General criminal intent exists "when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." La. Rev. Stat. 14:10(2). Absent a genuine dispute as to whether the accused intended to commit a charged act, evidence of extraneous crimes is inadmissible for the ostensible purpose of showing such intent. George W. Pugh, et al., Handbook on Louisiana Evidence Law, p. 331 (2000).

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[8] We further observed in Moore that "[t]he prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of evidence." 278 So. 2d at 785 (quoting R. v. Thompson, (1918) A.C. 221, 232).

The State relies on State v. Driggers, 554 So. 2d 720 (La. App. 2nd Cir. 1989), in which the appellate court found that evidence of the defendant's previous improper sexual conduct with other victims over a substantial period of time was relevant and admissible at the defendant's trial for multiple counts involving his granddaughter of indecent behavior with a juvenile, a specific intent crime, La. Rev. Stat. 14:81, and aggravated oral sexual battery, a general intent crime, La. Rev. Stat. 14:43.4. The Driggers case, however, does not support the State's argument that "lustful disposition" evidence may be used in the instant case to show the defendant's history of unnatural sexual interest in prepubescent female minors, because intent was genuinely at issue in the Driggers case. With regard to the oral sexual battery charge, the court of appeal in Driggers found that the defendant had placed his "general intent" at issue by claiming to police officers that the charged act, if it did occur, was accidental; therefore, the other crimes evidence tended to show that the "charges against the defendant did not occur by accident, but were intended by him." Driggers, 554 So. 2d at 725. That reasoning accords with this court's recognition that evidence of similar offenses may be relevant to show that "the act for which the defendant is on trial was not inadvertent, accidental, unintentional, or without guilty knowledge." State v. Kahey, 436 So. 2d 475, 488 (La. 1983) (citing McCormick, Evidence, § 190 (Cleary ed. 1972). Furthermore, Article 404(B) expressly permits the introduction of other crimes evidence to prove the absence of mistake or accident.

The defendant in the instant case, however, has categorically denied the charge. And the circumstances of the instant offense foreclose any possibility, or at least no rational jury could entertain the possibility, that the defendant's penis accidentally found its way into his victim's vagina or that it did so unaccompanied by lascivious intent. Instead, the issue for the jury to decide in this case is whether the defendant did

or did not have vaginal intercourse with an underage victim, and not whether he intended to do so.

Nor is motive genuinely at issue in this rape case. In State v. Sutfield, 354 So. 2d 1334 (La. 1978), we held that the "motive" for a charged offense "must be more than a general one, such as gaining wealth. . . . [I]t must be a motive factually peculiar to the victim and the charged crime." 354 So. 2d at 1337; see also State v. Lee, 569 So. 2d 1038 (La. App. 3rd Cir. 1990). In the case of rape, which requires proof of the unequivocally sexual act of sexual penetration "however slight," La. Rev. Stat. 14:41(B), motive and intent are self-proving from the commission of the act itself, and are not material issues genuinely contested at trial. See State v. Moore, 278 So. 2d at 784. As we explained in McArthur, "[i]f, as in this case, the other crimes evidence does not tend to show a motive to commit this particular crime against this particular victim, it merely shows a character trait and is inadmissible character evidence." McArthur, 97-2918, p. 3, 719 So. 2d at 1042. A history of unnatural sexual interest in young girls is too general an allegation to show that the defendant had a motive particular to this victim and the circumstances of the crime. Instead, given that motive is not genuinely at issue, it is tantamount to an attempt to show that the defendant has improper sexual proclivities and that he must have acted in conformity with them.

The State also argues in brief that the other crimes evidence is admissible as evidence of a "pattern" because the alleged incidents have a number of similarities. However, intent is not genuinely at issue in this case, and evidence of modus operandi to prove identity may only be introduced under narrow circumstances. In State v. Code, 627 So. 2d 1373 (La. 1993), we set forth the restrictions under which other crimes evidence is admissible to show identity: where the issue of identity of the perpetrator is genuinely in dispute and the crimes involved are "so distinctive as to lead

to the conclusion they were the work of the same person." 627 So. 2d at 1383. The other crimes evidence sought to be introduced by the State does tend to reveal the defendant's predisposition to assault sexually prepubescent girls under his care and supervision. Such a pattern, however, is fairly typical of sexual assaults against children and is, therefore, far too general to qualify as this particular defendant's "signature." See State v. Ledet, 345 So. 2d at 478-79.

Article 404(B) of the Louisiana Code of Evidence is based on Rule 404(b) of the Federal Rules of Evidence, which contains an identical prohibition on the admission of evidence other crimes, wrongs, or acts to prove the character of a person to show that he acted in conformity therewith. As we noted in both Miller and McArthur, the federal rule has been expressly supplanted in cases involving sex crimes against both child and adult victims. Rule 413(a) of the Federal Rules of Evidence provides that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." Writing for the court, Justice Victory cautioned in McArthur, "[u]nless and until the legislature changes our statutory law to follow Rule 413(a) of the Federal Rules of Evidence, we will continue to apply the law as it presently exists." McArthur, 97-2918, p. 10, 719 So. 2d at 1043. We therefore desist from the exhortation to legislate when our legislature has chosen to leave the law as written.

We recognize, however, that evidence the defendant may have committed similar offenses under similar circumstances, albeit fourteen years before the charged crime, can be relevant and probative to the jury's credibility determinations in a case that principally rests on the testimony of a now ten-year-old victim. Yet, the problem presented by this case is that, because the evidence sought to be introduced does not

bear upon an essential element of the offense, and because motive, intent, and identity are otherwise not genuinely at issue, evidence that the defendant has allegedly raped another female child placed under his supervision on a prior occasion is but another way of demonstrating that he has the propensity to commit such crimes and that the act charged against him probably occurred just as the present victim claims. Such prior sexual misconduct evidence, despite having certain relevance and probative value, is nonetheless inadmissible as a matter of the explicit statutory injunction in La. Code Evid. art. 404(B), that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith," unless the State is able to demonstrate that the other crimes evidence is independently relevant under either a statutory or judicially-recognized exception to this general exclusionary rule.

**DECREE**

Because the State has failed to make the required showing for the admissibility of the other crimes evidence, we find the State has not satisfied its burden of proof under La. Code Evid. art. 404(B) and State v. Prieur. Accordingly, we find the court of appeal correctly applied Louisiana law governing the admissibility of evidence of other crimes, wrongs, or acts. The court of appeal's decision reversing the district court's pretrial ruling is affirmed, and the case is remanded to the district court for further proceedings.

**AFFIRMED AND REMANDED**